BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2019-185-E
DOCKET NO. 2019-186-E

In the Matter of: South Carolina Energy Freedom Act (H.3659) Proceeding to Establish Duke Energy Carolinas, LLC's and Duke Energy Progress LLC's Standard Offer Avoided Cost Methodologies, Form Contract Power Purchase Agreements, Commitment to Sell Forms, and Any Other Terms or Conditions Necessary (Includes Small Power Producers as Defined in 16 United States Code 796, as Amended) – S.C. Code Ann. Section 58-41-20(A)	**DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC'S RESPONSE TO JDA/SCSBA AND SACE/CCL PETITIONS FOR REHEARING OR RECONSIDERATION**

NOW COME Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP" and, together with DEC, the "Companies" or "Duke"), by and through counsel, and hereby respond to the Petitions for Rehearing or Reconsideration ("Petition(s)") (1) jointly filed by the Southern Alliance for Clean Energy and the South Carolina Coastal Conservation League and (collectively, "SACE/CCL"); and (2) jointly filed by Johnson Development Associates, Incorporated ("JDA") and the South Carolina Solar Business Alliance, Incorporated ("SCSBA") (collectively, "JDA/SCSBA") pursuant to S.C. Code Ann. § 58-27-2150 and S.C. Code Ann. Regs. 103-825.

INTRODUCTION AND SUMMARY OF RESPONSE

Order No. 2019-881(A) (the "Order") is 169 pages and contains 34 distinct findings of fact. While Duke does not agree with all of the Commission's determinations in the

Order,[1] the issue now before the Commission on reconsideration is (1) whether the Order is consistent with the legal requirements of Act 62, specifically the Public Utility Regulatory Policies Act of 1978 ("PURPA") implementation requirements prescribed in S.C. Code Ann. § 58-41-20; and (2) whether substantial evidence in the record supports the Commission's findings and conclusions in the Order or whether the decision of the Commission is clearly erroneous in light of the whole record. JDA/SCSBA and SACE/CCL have wrongly approached reconsideration as an opportunity to reargue issues clearly decided in the Order, raise new arguments and issues, and re-assert the significance of their witnesses' testimony, all in an effort to convince the Commission to modify the Order and to arrive at different conclusions on numerous issues related to the calculation of DEC's and DEP's avoided cost rates. For reasons further discussed herein, the Commission should deny JDA/SCSBA's and SACE/CCL's requests for reconsideration and find that it dutifully applied its expertise in ratemaking proceedings in reviewing the evidence in the record and applying the legal standards and requirements of PURPA as more expressly prescribed by the General Assembly in Act 62.

The Commission's extensive findings and conclusions in the Order are supported by substantial evidence and none of those findings and conclusions—even those Duke disagrees with—are based upon a misapprehension of evidence or are clearly erroneous when viewed in light of the whole record of evidence before the Commission in these proceedings. Notably, the Commission's findings and conclusions on each of the avoided cost rate issues now challenged by SACE/CCL and JDA/SCSBA were decided consistent with the expert testimony offered by the Office of Regulatory Staff ("ORS") as well as the

[1] Duke filed a petition for reconsideration of the Order on January 13, 2020 ("Duke Petition"). Nothing in this response waives any of the Companies' arguments advanced in the Duke Petition.

recommendations submitted in the report by the Commission's independent expert consultant, Power Advisory ("Power Advisory Report"). SACE/CCL and JDA/SCSBA fail to show that the Commission's findings and conclusions are clearly erroneous or that reconsideration of these issues is warranted.

The Commission must also not arbitrarily and capriciously modify its findings and conclusions in the Order absent a rational basis, reasoned analysis, and adequate determining principles. Such a blatant "about-face" based upon the same record of evidence would be unsupportable and would prejudice Duke's substantial rights to an objective and reasoned determination of the important issues presented for decision in these proceedings.

It would also be unlawful for the Commission to approach reconsideration as an opportunity to increase the rates to be offered to solar qualifying facilities ("QFs") above Duke's actual avoided costs. Such subsidization would be improper as a matter of law, as Act 62 requires the Commission to decide the issues before it in these proceedings in a manner that is "consistent with PURPA and the Federal Energy Regulatory Commission's implementing regulations." PURPA and FERC's regulations clearly prescribe that the rates for purchases of QF power must be set in a manner that is just and reasonable to the utility's customers and shall not exceed the purchasing electrical utilities' avoided costs. *See* 16 U.S.C. § 824a-3(b), (d); 18 C.F.R. 292.304(a). Contrary to the implicit suggestion of JDA/SCSBA, QF financeability is not a relevant consideration in assessing the quantification of a utility's avoided costs under PURPA and Act 62.

The Commission must also deny JDA/SCSBA's requests for limited rehearing on the issue of longer-term contracts under S.C. Code. Ann. § 58-41-20(F)(1) as a matter of

law. The Order correctly determined that no proposal from intervenors offering specific "terms, conditions, and/or rate structures" was entered into evidence in these proceedings that complies with S.C. Code Ann. § 58-41-20(F)(1). Accordingly, because the Commission did not rule on the substance of JDA/SCSBA's proposals first offered in their joint proposed order, these issues were not evidence "determined by the Commission" pursuant to S.C. Code Ann. § 58-27-2150. It would therefore be improper as a matter of law to allow rehearing of this issue, in order to allow JDA/SCSBA to introduce new proposals into evidence. Stated another way, the purpose of reconsideration or rehearing is to afford the Commission an opportunity to correct factual or legal errors in the Commission's Order prior to a potential appeal; it is not license for a losing party's attorney to get a second bite at the apple by introducing new evidence on issues not decided in the Commission's Order.

Granting rehearing to allow JDA/SCSBA to introduce new proposals on the issue of contract length would also violate the clear procedural requirements prescribed by the General Assembly in Act 62, which requires any proposals presented by intervenors under S.C. Code Ann. § 58-41-20(F)(1) to be decided as part of the now-concluded avoided cost/PURPA implementation proceeding held pursuant to S.C. Code Ann. § 58-41-20(A).

Granting rehearing for the purpose of initiating a new evidentiary proceeding prior to the Commission's next PURPA proceeding under S.C. Code Ann. § 58-41-20(A) would also be arbitrary and capricious, as the Commission fully and clearly explained its rationale for not considering JDA/SCSBA's proposals, as well as provided guidance for how QFs could still pursue entering into longer-term contracts in compliance with Act 62 prior to

the next avoided cost/PURPA implementation proceeding to be held pursuant to S.C. Code Ann. § 58-41-20(A).

In sum, Duke respectfully requests the Commission to deny JDA/SCSBA's and SACE/CCL's Petitions for reconsideration of the Order.

STANDARD OF REVIEW

A. Standard for Commission Rehearing or Reconsideration under S.C. Code Ann. Reg. 103-825.

The purpose of a petition for rehearing and reconsideration is to allow the Commission to identify and correct specific alleged errors and omissions in its prior rulings. Under the operative Commission regulation, S.C. Code Ann. Reg. 103-825(4):

> A Petition for Rehearing or Reconsideration shall set forth clearly and concisely:
> (a) The factual and legal issues forming the basis for the petition;
> (b) The alleged error or errors in the Commission order;
> (c) The statutory provision or other authority upon which the petition is based.

Conclusory statements and general and non-specific allegations of error do not satisfy the requirements of the rule. *See In re S.C. Pipeline Co.*, Docket No. 2003-6-G, Order No. 2003-641, at 6 ("[A] conclusory statement based upon speculation and conjecture is no evidence at all and is legally insufficient to support a [petition for reconsideration]"). While the requirement of specificity in post-trial motions is interpreted with flexibility, at minimum the decision-making body must be "able to both comprehend the motion and deal with it fairly." *See Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010). Additionally, a party cannot raise issues in a motion to reconsider that were not raised during the proceeding. *See Kiawah Prop. Owners Group v. Pub. Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004); *Hickman v. Hickman*, 301 S.C. 455, 456,

392 S.E.2d 481, 482 (Ct. App. 1990); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995).

B. Reconsideration of the Commission's Order is an extraordinary remedy, and should be granted only upon a change in law, new evidence not available at hearing, or when a clear error of law or fact exists.

"In rate cases, [the] Public Service Commission is recognized as the 'expert' designated by the legislature to make policy determinations regarding utility rates." *Hamm v. S.C. Pub. Serv. Comm'n*, 294 S.C. 320, 322, 364 S.E.2d 455, 456 (1988) (citing *Patton v. S.C. Pub. Serv. Comm'n*, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984)). Through enactment of Act 62, the General Assembly has extended its recognition of the Commission's expertise to ratemaking proceedings to set electrical utilities' avoided cost rates under PURPA. S.C. Code Ann. § 58-41-20(A), (B)(1)(directing Commission to establish each utility's avoided cost methodologies and to fix avoided cost rates for purchases of energy and capacity that fully and accurately reflect the electrical utility's avoided costs).

"When presiding over a ratemaking proceeding, the PSC takes on a quasi-judicial role." *Utils. Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 105, 708 S.E.2d 755, 760; *see also* § 58-3-225(A) (2015) ("Hearings conducted before the commission must be conducted under dignified and orderly procedures designed to protect the rights of all parties."). This extends to the instant proceeding implementing Act 62, and specifically to the Commission's reconsideration of the Order pursuant to S.C. Code Ann. § 58-27-2150. In hearing and deciding petitions for reconsideration, the Commission has explained that "[t]he party challenging a PSC order must establish that (1) the PSC decision is not supported by substantial evidence; and (2) the decision is clearly erroneous in light of the substantial evidence in the record." *Order Granting in Part and Denying in*

Part Motions for Rehearing and Reconsideration, Order No. 2019-454, at 9, Docket No. 2018-318-E (Oct. 18, 2019) ("DEP 2018 Rate Case Reconsideration Order") (citing *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 109, 597 S.E.2d 105, 109 (2004)). "Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action. . . .[i]t is more than a mere scintilla of evidence, but is something less than the weight of the evidence." *Porter v. S.C. Public Service Comm'n*, 333 S.C. 12, 20 507 S.E.2d 328, 332 (1998).

Motions for reconsideration of Commission orders are similar to post-trial motions requesting a trial court to amend or reconsider judgments under Rule 59(e) of the South Carolina or Federal Rules of Civil Procedure. In considering similar motions under Rule 59(e), federal courts in South Carolina and the Fourth Circuit Court of Appeals have recognized three limited grounds for amending an earlier judgment: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *White v. Renaissance Hotel Mgmt. Co.*, LLC, 2016 U.S. Dist. LEXIS 6288, *5-6, *citing Pac. Ins. Co. v. Am. Nat. Fire Ins. Co.,* 148 F.3d 396, 403 (4th Cir. 1998). The Fourth Circuit has emphasized that "[i]n general reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Id.* (citation and internal quotation marks omitted). Importantly, a motion for reconsideration "is not a license for a losing party's attorney to get a second bite at the apple." *White v. Renaissance Hotel Mgmt. Co.*, LLC, 2016 U.S. Dist. LEXIS 6288, *5-6 (2016) (internal citation omitted). This Commission has similarly recognized this "guiding principle" that "[t]he purposes of a

petition for rehearing is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing is not just to have the case tried in this court a second time." *DEP 2018 Rate Case Reconsideration Order*, Order No. 2019-454, at 11-12, *citing Arnold v. Carolina Power & Light Co*., 168 S.C. 163, 167 S.E. 234, 238 (1933).

Neither JDA/SCSBA nor SACE/CCL raise any intervening changes in controlling law (none have occurred since Act 62 was enacted) nor identify any new evidence that was not available at the time of hearing. Accordingly, Duke submits that the Commission should apply the foregoing standard—reconsideration should only be granted, where necessary, to correct a clear error of law or where the Commission's decision is not supported by substantial evidence and the decision is clearly erroneous in light of the whole record—in its consideration of the pending Motions.[2] Indeed, this standard for reviewing the Commission's Order aligns with the Supreme Court's recognition that the Commission's "findings are presumptively correct, requiring the party challenging an order to show the decision is clearly erroneous in view of the substantial evidence on the whole record." *Kiawah Prop. Owners Group v. PSC*, 357 S.C. 232, 237, 593 S.E.2d 148, 157 (2004).

C. The Commission must not arbitrarily reconsider its Order.

The Commission must not arbitrarily reconsider its extensive findings of fact and conclusions of law presented in the Order. *See Daufuskie Island Utility Company, Inc. v*

[2] Notably, the Duke Petition for reconsideration is limited to raising an error of law and presenting a necessary correction to the Commission's conclusions regarding DEC's avoided capacity rates to recognize a correction to ORS witness Horii's hearing testimony. While Duke did not agree with certain of the Commission's findings of fact and conclusions of law and continues to fully support the Companies' methodology for calculating avoided capacity under the peaker methodology, Duke has not sought rehearing and/or reconsideration of the Commission's Order where the Order was supported by substantial evidence in the record.

South Carolina Office of Regulatory Staff, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019), *reh'g denied* (Sept. 27, 2019) (reversing and remanding Commission ratemaking order where Court found applicant utility was subjected to "arbitrary, higher standard of scrutiny [on remand that] affected the substantial rights of the [applicant utility]"). A decision of the Commission is arbitrary "if it is without a rational basis, is based . . . not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Id.* (citations and internal quotation marks omitted). Requests for the Commission to simply reweigh the evidence and to arrive at fundamentally different conclusions as to the Companies' compliance with Act 62 and PURPA should be denied as arbitrary, without rational basis and not upon grounded in any course of reasoning and reasonable exercise of Commission judgment.

ARGUMENT

I. SACE/CCL's and JDA/SCSBA's Arguments Regarding the Order's Assessment of Risks to the Using and Consuming Public and JDA/SCSBA's Arguments Regarding QF Financeability Should be Rejected as a Matter of Law.

JDA/SCSBA and SACE/CCL argue that the Order fails to fully recognize and account for the risks and benefits of independently-owned QF generation relative to utility-owned generation. JDA/SCSBA Petition, at 8-9; SACE/CCL Petition, at 3-6. These parties argue that the Commission unduly relied upon testimony regarding the "overpayment risk" associated with longer-term fixed price contracts and failed to fully recognize the benefits of QF generation, *see* SACE/CCL Petition, at 5-6, as well as failed to "heed the core directives of Act 62" to promote independent renewable energy development under PURPA. JDA/SCSBA Petition, at 8. JDA/SCSBA also repeatedly

assert in their Petition that the impact of the Commission's Order is to make large-scale solar "not financeable" at the avoided cost rates approved in the Order. JDA/SCSBA Petition, at 10. These arguments should be rejected as a matter of law because neither JDA/SCSBA nor SACE/CCL specifically identify any findings and conclusions that were improperly decided as a matter of law or decided not based upon substantial evidence. Moreover, based on the totality of the Petitions, it appears that JDA/SCSBA's and SACE/CCL's real objective in raising these issues is to persuade the Commission to "promote the development of solar QFs" by arbitrarily increasing the avoided cost rates approved in the Order—such a result would be legally improper and these arguments must be denied as a matter of law.

As an initial matter, the Order clearly recognizes the extensive conflicting testimony on the issue of what risks the Commission should consider and how the Commission should take such risks into account to meet Act 62's mandate to "strive to reduce the risk placed on the using and consuming public." Order No. 2019-881(A), at 35-40 *citing* S.C. Code Ann. § 58-41-20(A). The Order then explains how the Commission "carefully reviewed the extensive testimony in the record as it relates to how Duke, on the one hand, and the solar industry intervenors, on the other, advocate that the Commission view the requirements of Act 62 to strive to reduce the risk placed on the using and consuming public in deciding the issues before the Commission in this proceeding." *Id.*, at 41, *citing* S.C. Code Ann. § 58-41-20(A).

SACE/CCL argue that the Commission failed to specifically address the Power Advisory Report's discussion of overpayment risk and to recognize SACE/CCL's cross examination and late-filed exhibit on the benefits of independently-developed renewable

energy generation relative to utility-owned generation. SACE/CCL Petition, at 5-6. While the Order does not specifically address Power Advisory's findings and the specific testimony SACE/CCL now highlights on these issues, the Commission did address SCSBA witness Davis' and JDA witness Chilton's testimony, which similarly questioned the over-payment risks raised by Duke as well as highlighted the benefits of independently-owned renewable QF generation relative to utility-owned generation. Order No. 2019-881(A), at 37-38, 42. And, importantly, the Commission's factual findings recognized that "[r]isks exist with both longer-term fixed price contracts paid to QFs under PURPA ***as well as with traditional utility generating resources***." Order No. 2019-881(A), at 27 (emphasis added). Therefore, the Commission's findings and conclusions have effectively considered the additional testimony now raised by SACE/CCL.

More importantly, however, the Commission found as a matter of law that the risks to be considered in these proceedings are tied to the Commission's responsibility under Act 62 to implement the avoided cost requirements of PURPA and that the weighing of these risks has effectively been predetermined by the General Assembly under Act 62. Order No. 2019-881(A), at 41. The Order explains that the "Commission is following the General Assembly's mandate to approve fixed 10-year contract terms as reasonably balancing the over-payment risks for consumers of longer-term fixed price avoided cost contracts and the General Assembly's goal of promoting renewable energy while fully and accurately calculating DEC's and DEP's avoided costs." Order No. 2019-881(A), at 44. The Order shows that the Commission considered and weighed the evidence presented by all parties on the issue of "striv[ing] to reduce the risk placed on the using and consuming public," as required by of S.C. Code Ann. § 58-41-20(A), and ultimately determined that

the General Assembly had predetermined the risks to be assigned to customers by initially fixing the avoided cost rates and contracts offered to QFs for a period of 10 years. The Commission's legal conclusion in this regard is fully supported by Act 62, and neither JDA/SCSBA nor SACE/CCL present any arguments to the contrary.

Indeed, SACE/CCL's and JDA/SCSBA's Petitions are legally deficient as neither explains how the Commission's Order arrived at conclusions that were either not supported by the evidence or that were contrary to law. The Order directs Duke to enter into avoided cost contracts for a duration of 10 years, as expressly required by Act 62. Order No. 2019-881(A), at 46, 163. In considering post-hearing Motions, the decision-making body must be "able to both comprehend the motion and deal with it fairly." *See Camp v. Camp,* 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010). On the face of their respective Petitions it is unclear what relief SACE/CCL and JDA/SCSBA seek in raising this issue. Therefore, the Commission should reject their requests as legally deficient.

Of greater significance, however, is the unstated argument underlying SACE/CCL's and JDA/SCSBA's Petitions on this issue, as well as JDA/SCSBA's new argument that Duke's avoided cost rates represent a "non-starter for solar financing," JDA/SCSBA Petition, at 10. Duke submits that the real objective of these parties in raising these issues is to persuade the Commission to promote solar QF development by arbitrarily reconsidering the Commission's Order through adjustments to increase the avoided cost rates to be paid to solar QFs. This is something the Commission must not do as a matter of law.

First, the Order appropriately recognizes the Commission's responsibility to comply with PURPA and Act 62's requirements by fully and accurately determining

DEC's and DEP's avoided costs in setting the avoided cost rates to be paid to QFs. Order No. 2019-881(A), at 17, 24, 28, 29, 46, 54, 55, 58, 66, 74. The Order also appropriately explains that the PURPA framework "requires the rates that electrical utilities pay to purchase QF energy shall not exceed the purchasing electrical utilities' 'avoided costs,'" and requires that "the rates for purchases of QF power be set at levels and in a manner that is just and reasonable to the utility's customers, in the public interest, and nondiscriminatory towards QFs." Order No. 2019-881(A), at 21, *citing* 16 U.S.C. § 824a-3(b)(l); (2). Simply put, setting rates that exceed the utility's avoided costs with the intent of subsidizing QFs to promote renewable energy development is unlawful and the Commission cannot arbitrarily modify the rates approved in the Order to promote the financeability of solar QF projects. *See* Tr. Vol. 2, at 621.13 *citing S. Cal. Edison Co.,* 71 FERC ¶ 61269, 62079–80 (1995) ("PURPA requires an electric utility to purchase power from a QF, but only if the QF sells at a price no higher than the cost the utility would have incurred for the power if it had not purchased the QF's energy and/or capacity, i.e. would have generated itself or purchased from another source. The intention was to make ratepayers indifferent as to whether the utility used more traditional sources of power or the newly-encouraged alternatives.") The issue of QF financeability has never been—nor can it be—considered in assessing the quantification of a utility's avoided costs under PURPA.[3] And Act 62 is explicit that the Commission's decisions must be "consistent with PURPA and the [FERC's] implementing regulations" in deciding the avoided cost issues presented in these proceedings. *See* S.C. Code Ann. § 58-41-20(A). Accordingly, it would

[3] FERC's only recognition of QF financeability as relevant to PURPA implementation has been to recognize that the contract term of a legally enforceable obligation should be "long enough to allow QFs reasonable opportunities to attract capital from potential investors." *See* Tr. Vol. 2, at p. 621.36 *citing Windham Solar, LLC,* 157 FERC ¶ 61,134 (2016).

be improper as a matter of law to arbitrarily increase avoided cost rates in order to promote QF development.

The Commission should also disregard JDA/SCSBA's arguments on QF financeability because these arguments were not presented in this proceeding and are now not properly before the Commission. A party cannot raise issues in a motion to reconsider that were not raised during the proceeding. *See Kiawah Prop. Owners Group v. Pub. Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004). JDA/SCSBA fail to point to any testimony on this issue that the Commission failed to properly consider because they never argued that even Duke's initially-proposed avoided cost rates were "not financeable" in testimony or at the hearing. Indeed, JDA witness Rebecca Chilton's testimony was that "the avoided cost pricing proposed by Duke will make it difficult for most projects to obtain financing for a 10-year contract" but that a longer term 15- to 20-year contract with appropriate statutory conditions (which, as discussed in the Order and addressed further below, JDA failed to present) would "facilitate the opportunity to obtain financing for a majority of QFs in South Carolina." Tr. Vol. 1, at 334.9-10. During the hearing, SBA witness Steven Levitas testified that "I don't think we're at a point in South Carolina right now where the rates that are being proposed would produce anything remotely approaching a windfall to developers. It's going to be hard to finance." Tr. Vol. 1, at 369. However, at no point until these parties filed a Petition requesting the Commission reconsider the Order did they argue that Duke's initially proposed, and materially lower, avoided cost rates would be a "non-starter for solar financing." Thus, the Commission should disregard this clear change in position and, for the reasons stated above, must not arbitrarily reconsider the Commission's Order to increase the avoided cost rates to be paid to QFs.

II. JDA/SCSBA's Requests for Reconsideration Regarding Avoided Energy Cost Quantification and Rate Design Should be Denied.

Order No. 2019-881(A) recognizes that as part of the Commission's responsibility under Act 62 to approve Duke's avoided cost methodology, the Commission must ensure that "rates for the purchase of energy and capacity fully and accurately reflect the electrical utility's avoided costs" including the utility's energy costs to be avoided by purchases from QFs." Order No. 2019-881(A), at 58 *citing* S.C. Code Ann. § 58-41-20(B)(1),(3). Findings of fact 9-11 and pages 58-82 of the Order present extensive support for the Commission's decision to adopt the Companies' avoided energy cost quantification methodology and rate design. JDA/SCSBA request the Commission reconsider two aspects of the Order No. 2019-881(A)'s determination of the Companies' avoided energy rate design: (1) the Commission's decision to adopt Duke's proposed avoided energy rate design pricing periods and to reject SBA witness Burgess's proposal to modify the avoided energy rate design to add two additional energy pricing periods; and (2) the Commission's approval of Duke's proposal to calculate avoided energy rates for Large QFs (those not eligible for the Standard Offer) based on a resource-specific generation production profile. As further discussed herein, both aspects of Order No. 2019-881(A) are supported by substantial evidence in the record, are not based upon errors of law, and should not be reconsidered by the Commission.

a. Order No. 2019-881(A)'s findings and conclusions approving DEC's avoided energy rate design are supported by substantial evidence, are not contrary to law and should not be reconsidered as JDA/SCSBA fail to establish that the Commission's determination was clearly erroneous.

JDA/SCSBA's Petition essentially argues that the Commission should reverse its finding and conclusion that DEC's avoided energy rate design "ensures that avoided cost rates accurately compensate QFs for the value of the energy they provide to the Companies

and customers," *see* Order No. 2019-881(A), at 29, 73-75, based upon two grounds: (1) that the Commission (and seemingly Duke) misapprehended SCSBA witness Burgess' alternative rate design recommendation; and (2) that the Commission's assertion that witness Burgess' alternative rate design recommendation was not more "cost beneficial to Duke's customers" runs afoul of PURPA and Act 62. JDA/SCSBA Petition, at 15-19. The Commission should reject JDA/SCSBA's requests as the Commission's findings and conclusions are based upon substantial evidence, are reasonable in light of the record as a whole on this issue, and are not contrary to law.

As an initial matter, JDA/SCSBA's Petition ignores the substantial evidence supporting the Commission's approval of DEC's avoided energy rate design and pricing periods.[4] In addition to the extensive evidence put forth by Duke witnesses Snider and Wheeler, SCJDA/SCSBA fail to note that ORS witness Horii testified that "the Companies have updated the Standard Offer avoided energy rate designs by adding more hourly and seasonal granularity to more accurately reflect the hours when QFs provide energy value to the Companies." Order No. 2019-881(A), at 71. Second, JDA/SCSBA disregard that Power Advisory performed an "independent analysis" of DEC's proposed pricing periods, which resulted in Power Advisory making no modifications to Duke's proposal. Order No. 2019-881(A), at 75 *citing* Power Advisory Report, at 17. Finally, JDA/SCSBA fail to note that SACE/CCL do not contest DEC's pricing periods, and that no other witness, besides Mr. Burgess, argued in opposition to DEC's proposed avoided energy rate design. Thus,

[4] While Section II.B.1 of JDA/SCSBA's Petition references "Duke's proposed pricing periods" twice, the Petition then proceeds to solely critique the Commission's determination of DEC's avoided energy rate design and argues "the Commission should reconsider its decision on DEC's avoided energy rates." For the avoidance of any doubt, the Companies read JDA/SCSBA's Petition to limit its request for reconsideration solely to DEC.

there is substantial evidence in the record supporting the Commission's approval of DEC's avoided energy rate design.

JDA/SCSBA also argue that the Commission "fundamental[ly] misunderstood[]" witness Burgess' testimony in ruling on DEC's proposed pricing periods. To support this contention, JDA/SCSBA's Petition cites to Tr. Vol. 1, at 382.38 and suggests that Mr. Burgess "testified that some of Duke's proposed pricing periods would result in rates that would **not** accurately represent [Duke's] actual system costs." JDA/SCSBA Petition, at 15 (emphasis in original). Mr. Burgess' testimony, however, nowhere states that Duke's proposed pricing periods do "**not** accurately" represent actual system costs. In fact, throughout the entirety of Mr. Burgess' testimony on this issue, Mr. Burgess does not once testify that Duke's pricing periods are "inaccurate," "incorrect," or "not reflective of DEC's system costs," and, instead, notes that "[i]t is important to recognize that the number of pricing periods…is a subjective decision." Tr. Vol. 1, at 382.37-43 and Tr. Vol. 2, at 787.17.

Moreover, contrary to JDA/SCSBA's suggestion in the Petition, the Order appropriately recognized that Mr. Burgess' recommendation for additional pricing periods to be incorporated into the rate design was made with the specific purpose of increasing a solar QF's revenue. Order No. 2019-881(A), at 74. For example, in the four pages of Mr. Burgess' direct testimony addressing Duke's proposed pricing periods, Mr. Burgess extensively focuses on how the rate design could "significantly affect solar compensation" and "ultimately impact solar QF revenues." Tr. Vol. 1, at 382.37-38, 39. The Commission's Order fairly summarizes witness Burgess' testimony and addresses his recommended alternative rate design recommendation in making its determination. Order

No. 2019-881(A), at 71-72, 74. Contrary to JDA/SCSBA's arguments, it is unreasonable to conclude that the Commission "fundamentally misunderstood" Mr. Burgess' testimony or failed to consider it in its approval of Duke's avoided energy rate design and pricing periods.

JDA/SCSBA also inaccurately assert that no evidence in the record "contradict[s] Mr. Burgess's testimony that his proposed pricing periods are more accurate and appropriate than those proposed by DEC." JDA/SCSBA Petition, at 17. To the contrary, the Order cites Duke witness Snider's testimony specifically rebutting "SCSBA Witness Burgess's alternative avoided energy rate design as improperly focused on the specific operating characteristics of solar QFs while ***shifting compensation away from hours when the Companies and their customers see the most value*** for the energy delivered by the QF." Order No. 2019-881(A), at 74 (emphasis added). Moreover, the Power Advisory Report explains that Power Advisory inquired of Duke whether additional pricing periods, such as those put forth by Mr. Burgess, would actually provide "more accurate and appropriate" pricing periods. Power Advisory Report, at 16-17. Power Advisory specifically noted Duke's response that "going to a more granular hourly forecast would not necessarily produce a better price signal." *Id.* And Power Advisory's ultimate conclusion is to accept the Companies' avoided energy rate design and to recommend the Commission require Duke to "provide appropriate analytical support for their avoided cost periods in subsequent filings." Power Advisory Report, at 17. Notably, the Order arrives at exactly the same conclusion, including directing Duke to "provide additional analytical support for the avoided cost rate periods in future avoided cost filings." Order No. 2019-881(A), at 75. Therefore, not only is there substantial evidence in the record supporting

the Commission's determination, but there is also substantial evidence "contradict[ing] Mr. Burgess's testimony that his proposed pricing periods are more accurate and appropriate than those proposed by DEC." Accordingly, Duke submits that JDA/SCSBA fail to establish that the Commission's determination to adopt DEC's proposed avoided energy rate design and pricing periods was clearly erroneous. Accordingly, JDA/SCSBA's Petition for reconsideration on DEC's pricing periods should be rejected.

Moreover, JDA/SCSBA' argument that the Commission's Order "ran afoul of PURPA and Act 62" by finding that SCSBA's modified pricing periods were not "cost beneficial to Duke's customers" should also be rejected. JDA/SCSBA Petition, at 18 *citing* Order No. 2019-881(A), at 74. The Order goes on to clearly state later in the same paragraph:

> . . . PURPA requires non-discriminatory rates to be established for QFs, while customers should be left indifferent to the Companies' QF purchases. Further, the Commission finds that energy rate design should reflect the Companies' cost of service and system needs, as well as encourage QF generators to adjust their operations to maximize their production ***during hours that are most beneficial to retail customers and therefore, the system as a whole***. This is supported by Act 62, which requires the Commission to treat small power producers on fair and equal footing with electrical utility-owned resources by ensuring that "rates for the purchase of energy and capacity fully and accurately reflect *the electrical utility's* avoided cost." See Section 58-41-20(B)(1).

Order No. 2019-881(A), at 74 (emphasis added). When properly read in context, the Commission clearly recognized the requirements of PURPA in approving Duke's avoided energy cost rate design and explained its "cost beneficial" statement in the context of encouraging QF generators to maximize production during hours when their output would

provide the most value to the electrical utility's system. This statement in no way "runs afoul of PURPA and Act 62" as alleged by JDA/SCSBA.

b. Order No. 2019-881(A)'s findings and conclusions approving Duke's proposal to develop Large QF-specific avoided cost rates are supported by substantial evidence and JDA/SCBSA fail to establish that the Commission's determination was clearly erroneous.

JDA/SCSBA additionally request the Commission reconsider its findings and conclusions authorizing Duke to apply a project-specific production profile to calculate avoided energy rates for Large QFs not eligible for the standard offer. JDA/SCSBA Petition, at 19-23. Because JDA/SCSBA do not allege, much less establish, that the Commission's decision is not supported by substantial evidence or that the decision is clearly erroneous in light of the substantial evidence in the whole record, the Commission should deny reconsideration on this issue. Granting reconsideration to reach to a different outcome on this issue, based on the same information available to the Commission at the time its decision was made, would also be arbitrary and capricious and improper as a matter of law.

The Commission's Order is robust in describing the evidence in the record on this issue from all parties and the rationale for its decision. *See* Order No. 2019-881(A), at 75-82. The Commission's determination is supported by the testimony of Duke witness Snider and the conclusions reached by Power Advisory. *See* Order No. 2019-881(A), at 81 *citing* Power Advisory Report, at 18. Specifically, with regard to the question of transparency raised by JDA/SCSBA, the Order squarely addresses this issue, describing SBA witness Burgess's concerns about transparency and Duke witness Snider's responsive testimony, which explains the manner in which Duke will apply the solar specific load profile, and, importantly, that such operating profile will be established by the QF and provided to the

Companies for purposes of more precisely calculating the costs to be avoided by purchasing from the QF. Order No. 2019-881(A), at 78.[5] The Commission's Order is clear that it weighed the evidence by both parties and reached a conclusion, taking into account the record before the Commission specifically including the Power Advisory Report. As a result, JDA/SCSBA cannot, and, tellingly, does not, argue that the Commission's decision is clearly erroneous or contrary to the substantial evidence in the record.

JDA/SCSBA's Petition also perplexingly alleges that Duke is "fundamentally chang[ing] its methodology" and that "it is unclear what pricing periods, if any, Duke proposes to utilize for Large QFs." JDA/SCSBA Petition, at 22. This allegation is perplexing (and false) as neither Duke's testimony nor the Order contemplate that Duke is departing from application of the peaker methodology and the energy rate design pricing periods approved by the Commission in this proceeding. To the contrary, Duke witness Snider specifically addressed this concern, explaining that the only proposed methodological change is to "take into account the production profile of the facility when calculating [the QF's] avoided costs." Tr. Vol. 2, at 630.37. Thus, the only methodological change requested by Duke or approved in the Order is to apply a resource-specific generation profile in applying the peaker methodology to more accurately quantify the system costs to be avoided by purchases from the Large QF.[6] Duke did not request authority to modify the "pricing periods" or rate design under which the avoided costs

[5] Power Advisory noted SCSBA witness Burgess' alleged concern that "methodological changes in the non-standard offer calculation are not transparent." Power Advisory Report, at 18. However, Power Advisory, who was specifically tasked with assessing the transparency of Duke's avoided cost filing, did not raise similar transparency concerns and, to the contrary, recommended the Commission adopt Duke's proposed approach to "reflect[ing] the specific operating profile of the large QF [as] result[ing] in a more reliable avoided cost rate." *Id.*

[6] Duke will also apply the up-to-date inputs under the peaker methodology, which JDA/SCSBA assert they do not oppose. JDA/SCSBA Petition, at 20.

quantified using the peaker methodology would then be paid to such Large QFs and the Order does not grant Duke such authority. JDA/SCSBA's arguments to the contrary should be disregarded.

The remainder of JDA/SCSBA's argument on this issue improperly raises new issues for the first time and should be rejected. JDA/SCSBA's Petition does not, and, indeed, cannot, point to any evidence in the record to support its argument that Duke's approach will not provide accurate energy rates or send appropriate "price signals" to solar plus storage facilities. JDA/SCSBA Petition, at 20, 22-23. And, to the contrary, the Order appropriately recognizes Power Advisory's finding that "the avoided cost rate will reflect the specific operating profile of the large QF and ***result in a more reliable avoided cost rate***." Power Advisory Report, p. 18 (emphasis added). Nor does JDA/SCSBA point to any evidence in the record to support a finding that the Commission's conclusion is "contrary to Act 62," and specifically to the transparency requirements of S.C. Code Ann. § 58-41-20(B) or (J). JDA/SCSBA Petition, at 22-23. These arguments were not raised by any JDA/SCSBA witness, and accordingly have no basis in the record, and should be rejected.

In sum, the Order is clear that the Commission evaluated all of the evidence in the record on this issue (JDA/SCSBA do not allege to the contrary) and made a reasonable determination that is based upon substantial evidence in the record. JDA/SCSBA have failed to show that the Commission's Order is either not supported by substantial evidence in the record, is clearly erroneous, or contrary to law. For the Commission to arrive at a different outcome based on the same evidence in the record would amount to an arbitrary and capricious decision, and JDA/SCSBA's request for reconsideration on this issue should be denied.

III. SACE/CCL's and JDA/SCSBA's Request for Reconsideration Regarding Avoided Capacity Quantification and Rate Design Should be Denied.

Order No. 2019-881(A) finds that Duke "reasonably supported" its use of an F-Frame CT for purposes of calculating avoided capacity rates and that ORS witness Horii's proposed seasonal allocation is reasonably representative of "current conditions." Order No. 2019-881(A), at 101-102, 113. Although Duke does not fully agree with the Commission's determination regarding seasonal allocation, the Commission's determinations on both issues are supported by record evidence and neither determination is clearly erroneous or incorrect as a matter of a law. JDA/SCSBA's Petition alleges that the "Commission erred" in: (1) rejecting SCSBA witness Burgess's recommendation to incorporate the significantly higher capital cost estimate of an aeroderivative CT unit when calculating the avoided capacity rate; (2) adopting seasonal allocation weightings of 99% / 1% winter/summer for DEP and 70% / 30% winter/summer for DEC; and (3) failing to specify that the Companies should incorporate updated resource plans when calculating the avoided capacity rates for Large QFs should therefore be rejected. SACE/CCL's Petition similarly challenges the Commission's weighing of the evidence on the seasonal allocation of capacity value issue.

As explained below, JDA/SCSBA's and SACE/CCL's arguments should be rejected as they fail to show that the Commission's determinations were improper as a matter of law or clearly erroneous in light of the Commission's reliance upon substantial record evidence put forth by ORS witness Horii, Power Advisory, and Duke in quantifying the Companies' avoided capacity costs. Put simply, JDA/SCSBA and SACE/CCL fail to present evidence showing that that the Commission "erred" in reaching its determinations,

and Petitioners' request for reconsideration with respect to issues (1) and (2) should be denied.

Regarding the third issue raised by JDA/SCSBA, Duke agrees with JDA/SCSBA that the Order approved Duke's use of updated resource plans when calculating the avoided capacity rates for Large QFs. This finding is not controverted and is supported by the record evidence. Therefore, clarification of the Order in this regard is reasonable, supported by the record evidence and appropriate under both PURPA and Act 62.

a. <u>The Order's findings and conclusions approving Duke's proposed avoided CT unit is supported by substantial evidence and JDA/SCSBA fail to establish that the Order's findings and conclusions are clearly erroneous.</u>

JDA/SCSBA argue that the Commission committed "multiple" "err[ors]" in rejecting Mr. Burgess' proposal to use the midpoint price between an aeroderivative CT and a F-Frame CT to calculate Duke's avoided capacity costs under the peaker methodology. JDA/SCSBA Petition, at 29. In support of their claim, JDA/SCSBA first allege that the Commission incorrectly found that "there is simply no basis to conclude that DEC or DEP are planning to construct aero-derivative CTs in the current 15-year planning period." *Id. citing* Order No. 2019-881(A), at 102. Second, JDA/SCSBA argue that the Commission erred in agreeing with Duke and Power Advisory that "the increased costs of constructing aeroderivative CTs would be caused by the intermittency and volatility of solar," and that "it would therefore be inappropriate" to use an aeroderivative CT for purposes of determining avoided capacity costs. *Id.* As explained below, substantial evidence in the record supports the Commission's rejection of Mr. Burgess' proposal and its conclusion that Duke "reasonably supported its use of the F-Frame CT." Order No. 2019-881(A), at 101-102.

Regarding the first "error" alleged by JDA/SCSBA, the Petition argues—for the first time in this proceeding—that the Commission "disregarded the fact that the IRP upon which the Companies rely [to support utilization of the F-Frame CT] has never been reviewed or approved by the Commission pursuant to the specific requirements of Act 62." JDA/SCSBA Petition, at 29. Nowhere in the record evidence, however, does Mr. Burgess, or JDA/SCSBA, allege that Duke's utilization of the F-Frame CT to calculate avoided capacity costs is somehow inaccurate or inappropriate because the Commission has "not approved" Duke's IRP or the F-Frame CT costs contained therein. JDA/SCSBA Petition, at 30. Accordingly, the Commission should disregard this argument as not supported by evidence in the record. Further, there is no legal basis under Act 62 or PURPA for the Commission to limit its weighing of the substantial evidence presented by Duke in the manner now suggested by JDA/SCSBA.

JDA/SCSBA also ignore the substantial evidence put forth by Power Advisory and Duke that provides the basis for the Commission's conclusion that the F-Frame CT cost is reasonable and that Duke is not planning to construct aeroderivative CTs in the current 15-year planning period. As cited throughout the Order, Duke witness Snider testified that DEC and DEP both have numerous F-Frame CTs units installed on their systems today, and also plan to build numerous F-Frame CTs in the future. Order No. 2019-881(A), at 96. Mr. Snider also testified that Duke is currently not projecting the need to build aeroderivative CTs. *Id.*, at 97-98. The Power Advisory Report concurs with Mr. Snider's testimony. Order No. 2019-881(A), at 101-102 *citing* Power Advisory Report, at 19-20. JDA/SCSBA also ignore the fact that Mr. Burgess' surrebuttal testimony does not refute Mr. Snider's testimony or provide any additional support for, or even make mention of, an

aeroderivative CT. *See* Tr. Vol. 2, at 787.1-26. Accordingly, substantial evidence exists in the record to support the Order's conclusion that Duke's reliance on the capacity cost of a F-Frame CT unit in quantifying the avoided capacity rate under the peaker methodology is reasonable and appropriate, and JDA/SCSBA have failed to present any credible evidence to show that this determination was clearly erroneous.

JDA/SCSBA's next allege that the Commission "erred" in concluding that "[e]ven if Duke were planning to construct [aeroderivative CT units] in the future, the Commission agrees with Duke and Power Advisory that the increased costs of constructing aeroderivative CTs would be caused by the intermittency and volatility of solar." JDA/SCSBA Petition, at 31 *citing* Order No. 2019-881(A), at 102. To support this alleged error, JDA/SCSBA state that "[c]ontrary to the assertions of Duke and Power Advisory, the decision to construct an aeroderivative CT unit would not solely serve as a means of integrating solar QFs, but would instead provide a valuable asset that would serve a variety of operational and economic purposes." JDA/SCSBA Petition, at 30. JDA/SCSBA do not cite to any record evidence in support of this statement, but, instead, argue that Duke is planning to procure "additional renewable generation" in the future, "separate and apart from any solar QFs that contract under PURPA in South Carolina," citing to the CPRE Program as well as Duke's "stated plans."[7] JDA/SCSBA Petition, at 31. Based on Duke's "stated plans," JDA/SCSBA somehow leap to the completely unsupported conclusion that "it would be appropriate and reasonable to incorporate such [an aeroderivative CT] unit

[7] In footnote 13, JDA/SCSBA again fail to cite to the transcript or any record evidence in support of their claim and instead cite to a Duke Energy website regarding "[Duke's] plan to reach net zero carbon emissions by 2050." Petition, at p. 31, fn. 13.

into the calculation of avoided capacity costs." *Id.* This argument lacks logic and has no basis in the record evidence before the Commission in this proceeding.

JDA/SCSBA's Petition again also ignores the extensive explanation provided first by Duke witness Snider, and then by Power Advisory as to why aeroderivative CTs, ***even assuming Duke were planning to build an aeroderivative CT and procure significant amounts of non-PURPA solar in the future,*** are not appropriate to use as the "peaker" unit under the peaker methodology. *See* Tr. Vol. 1, at 630.44. As explained first by Duke witness Snider and referenced on page 98 of the Order, ". . . even if a utility's next planned unit is not a simple cycle peaker, the peaker methodology still accurately represents a valid estimate of the utility's avoided costs." The Order also recognizes Power Advisory's similar conclusion that "it would not be appropriate to base the solar resources' capacity payment on the aeroderivative peaker's capacity costs." Order No. 2019-881(A), at 101-102 (citing Power Advisory Report, at 19-20).

In sum, JDA/SCSBA ignore substantial record evidence directly supporting the Commission's findings and refuting JDA/SCSBA's novel arguments to support reconsideration of Duke's avoided capacity costs. The Commission's determination is not clearly erroneous, and JDA/SCSBA's allegations that the Commission committed "multiple errors" in determining Duke's avoided capacity costs should therefore be rejected.

b. <u>While Duke does not support the Order's determination to adopt ORS's position regarding seasonal allocation of capacity value in fixing avoided capacity rates, the Order's findings and conclusions approving seasonal allocation are supported by substantial evidence and should not be reversed.</u>

On the controverted issue of seasonal allocation of capacity value, the Commission's Order rejected Duke's position and adopted the ORS' recommendation,

adjusting DEC's seasonal weighting ratio from 90% summer/10% winter to 70% summer/30% winter, and adjusting DEP's seasonal weighting ratio from 0% summer/100% winter to 1% summer and 99% winter. Order No. 2019-881(A), at 112. SACE/CCL and JDA/SCBSA challenge the Commission's findings and conclusions on seasonal allocation of capacity value, arguing that substantial evidence in the record does not support the Commission's conclusions, essentially because SACE/CCL witness Wilson and JDA/SCSBA witness Burgess criticized Duke's Solar Capacity Value Study and Resource Adequacy Study underlying DEC's and DEP's respective forecasted seasonal capacity needs. *See* SACE/CCL Petition, at 19; JDA/SCSBA Petition, at 28.

Contrary to these parties' arguments, the Commission's Order is based upon substantial evidence in the record. The Commission's Order extensively discusses the evidence presented by Duke witness Snider, ORS witness Horii, JDA/SCSBA witness Burgess, as well as SACE/CCL witness Wilson on the issue of the appropriate seasonal allocation of capacity value between winter and summer periods. *See* Order No. 2019-881(A), at 103-112. The Order finds that ORS' position is most accurate and appropriately "based on current conditions." Order No. 2019-881(A), at 112. In arriving at this conclusion, the Order identifies that ORS witness Horii accepted the Companies loss of load expectation ("LOLE") approach to quantifying avoided capacity value. Order No. 2019-881(A), at 103. In adopting ORS witness Horii's recommendation, the Commission noted the criticisms of Duke's Resource Adequacy Study and Solar Capacity Value Study by SACE/CCL witness Wilson and JDA/SCSBA witness Burgess, Order No. 2019-881(A), at 106, 107-108, and necessarily found that Duke's underlying studies were not "flawed" and that ORS' adjustments to Duke's analysis to rely upon "current conditions"

best represented the current value of capacity on the DEC and DEP systems. While the Commission did not explicitly identify the Power Advisory Report's discussion and findings on this issue, Power Advisory's conclusions were fully consistent with the Commission's determination. *See* Power Advisory Report, at 27 ("Power Advisory believes that the capacity weightings proposed by Mr. Horii in his surrebuttal testimony are reasonable and that the Companies should be directed to update their avoided capacity rates to reflect these ratings. . . . Power Advisory believes the LOLE studies used by Duke [and also relied upon by ORS witness Horii] are an appropriate methodology to assess the seasonal contribution of capacity.") Therefore, there is unquestionably substantial evidence in the record to support the Commission's determination and these parties fail to show that the Commission's decision is clearly erroneous.[8]

c. JDA/SCSBA's requested clarification of the Order regarding updating avoided capacity cost inputs for Large QFs under the peaker methodology is supported by the record and Duke does not oppose this clarification.

JDA/SCSBA seek clarification as to whether the Commission's Order finds that it is appropriate for DEC and DEP to incorporate the most up-to-date inputs under the approved peaker methodology in calculating either only avoided energy costs or both avoided energy and avoided capacity costs. JDA/SCSBA Petition, at 33. These parties contend that if the Commission maintains its original ruling that updated inputs should be used to calculate Large QF avoided cost rates, that such updates should also apply to the

[8] SACE/CCL's related argument that the Commission failed to make sufficient findings of fact on controverted issues relating to the reasonableness of Duke's Resource Adequacy Study and Solar Capacity Value Study should also be rejected. SACE/CCL Petition, at 25-27. By adopting findings and conclusions approving ORS's position on seasonal allocation (the avoided cost rate issue in dispute), the Commission sufficiently determined the underlying issues raised by SACE/CCL.

calculation of both avoided capacity and avoided energy rates. *Id.* Duke agrees with JDA/SCSBA's position and supports this interpretation of the Order.

As explained by Duke witness Snider, the Companies' proposal was to include both the most up-to-date avoided energy and avoided capacity inputs in calculating Large QF's avoided cost rates. The Order cites Mr. Snider's testimony that Duke's calculation of avoided cost rates for Large QFs would incorporate "updates to reflect any changes to the Companies' resource plan to be consistent with the most recently-filed IRPs in order to more accurately align the avoided cost rates paid to the QF with the value provided to customers." *See* Order, at 78-79 (citing Tr. Vol 2, at 630.37). Additionally, the Commission's determination underlying Finding of Fact No. 14 does not limit the Commission's finding to avoided energy costs, and instead "finds that it is appropriate for DEC and DEP to continue the practice of applying the most up-to-date inputs under the peaker methodology in calculating such [avoided cost] rates for large, non-Standard PPA QFs." *See generally* Order, at 79-82. Duke submits that the Commission's Order approves Duke's utilization of both updated avoided energy and updated avoided capacity inputs in calculating Large QF's avoided cost rates. *Id.*

IV. The Commission's Determination Regarding JDA/SCSBA's Failure to Introduce Longer-Term Fixed Price PPA Proposals Into Evidence under S.C. Code Ann. § 58-41-20(F)(1) Should Not Be Reconsidered.

Order No. 2019-881(A) extensively addresses JDA's and SCSBA's failure to properly offer into evidence proposals for commercially reasonable fixed price power purchase agreements with a duration longer than ten years containing "additional terms, conditions, and/or rate structures as proposed by intervening parties," as required under S.C. Code. Ann. § 58-41-20(F)(1). *See* Order No. 2019-881(A), at 19-20; 163-167.

JDA/SCSBA present two arguments in support of their request for reconsideration on this issue: (1) JDA/SCSBA allege the Commission erred as a matter of law by determining that it did not have the authority to approve a power purchase agreement with a contract tenor in excess of ten years "due to an incorrect reading of the statute," meaning that JDA/SCSBA believe they had no obligation to introduce their longer-term PPA proposal into evidence prior to the close of the evidentiary record; and (2) JDA/SCSBA allege the Commission's finding that substantial evidence to support a power purchase agreement with a contract tenor in excess of ten years was lacking from the record is "clearly erroneous." JDA/SCSBA Petition, at 35. Both arguments should be rejected and the Commission should deny reconsideration of its Order on this issue.

a. Order No. 2019-881(A) properly finds as a matter of law that no proposal from intervenors that complies with S.C. Code Ann. § 58-41-20(F)(1) was entered into the record.

The crux of the issues now raised by JDA/SCSBA is that these intervening parties failed to pursue the opportunity afforded by Act 62 to introduce a power purchase agreement proposal into evidence during the proceeding that meets the requirements of S.C. Code Ann. § 58-41-20(F)(1). Specifically, the Order finds and concludes that JDA/SCSBA failed to present a proposal "contain[ing] additional terms, conditions, and/or rate structures as proposed by intervening parties . . ." *See* Order No. 2019-881(A), at 19, 164. After the evidentiary hearing and prior to submittal of proposed orders, the Commission issued Order No. 2019-128-H, which established that it would not be appropriate for JDA and SCSBA to offer new evidence after the hearing, but accepted that it would be "permissible to include proposals that are based on the evidence and testimony in the record of the case in proposed orders." (emphasis in original). In Section IV.F of JDA/SCSBA's proposed order, JDA/SCSBA submitted two novel proposals for longer

term PPAs invoking S.C. Code Ann. § 58-41-20(F)(1). The Commission's Order rejected those proposals as not properly introduced into the record, explaining that JDA/SCSBA "effectively attempts to present new evidence in the form of the proposed modified terms, conditions, and/or rate structures that [JDA/SCSBA] advocate the Commission approve as part of a longer-term fixed price PPA option." Order No. 2019-881(A), at 165.[9]

JDA/SCSBA seemingly allege the Commission committed legal error by requiring that JDA/SCSBA's PPA proposals be supported by evidence in the record. Specifically, they argue that "the procedural orders issued by the Commission in this case . . . [did not] require that such proposals be entered into evidence (as opposed to, for example, being treated like motions, which must be supported by evidence but are not themselves evidence)" and further suggest that it would be an "impractical requirement for Intervenors . . . [that] all details of any PPA in excess of ten years would have to be drawn out for approval during the hearing." JDA/SCSBA Petition, at 35.

Contrary to JDA/SCBSA's arguments, Commission decisions must be grounded in "substantial evidentiary support in the record" to support the Commission's findings and conclusions. *See Nucor Steel, a Div. of Nucor Corp. v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992); *see also Lark v. Bi–Lo*, Inc., 276 S.C. 130, 135–36, 276 S.E.2d 304, 307 (1981). Facts presented in motions are not evidence, and cannot be relied upon by a tribunal as a basis for its order. *Kathy Stewart, Employee, Claimant/respondent the Kroger Co., Employer & Sedgwick Claims Mgmt. Servs., Inc.*,

[9] On November 12, 2019, the Companies filed a Response and Continuing Objection to JDA/SCSBA's Proposals Requesting Commission Approval of Longer-Term Purchased Power Agreements under S.C. Code § 58-41-20(F)(1) ("Response and Continuing Objection"). Because the arguments JDA/SCSBA now make and the purported evidentiary support they now identify as not properly considered by the Commission is fully consistent with the arguments and evidence presented by JDA/SCSBA in their proposed order, the Companies hereby incorporate their prior *Response and Continuing Objection* by reference. Section II.B (at pages 6-7) addresses how the JDA/SCSBA's proposal effectively constituted new evidence.

Carrier, Defendants/appellants, No. W.C.C. File No: 0613242, 2011 WL 3306293, at *2 (S.C. Work. Comp. Comm. July 13, 2011)(*citing Gilmore v. Ivy*, 209 S.C. 33, 348 S.E.2d 180 (Ct. App. 1986)); *see also Cobb v. Benjamin, 325 S.C. 573, 581, 482 S.E.2d 589, 593* (Ct. App. 1997) ("where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record").

Specific to this proceeding, Act 62 establishes clear procedural requirements for the Commission to follow in proceedings to implement S.C. Code Ann. § 58-41-20, including allowing for "intervention, discovery, filed comments or testimony, and an evidentiary hearing." S.C. Code Ann. § 58-41-20(A)(2). The Commission's procedural Order No. 2019-524 fully met these requirements and afforded JDA, SCSBA, and all other intervenors the opportunity to pre-file direct and surrebuttal testimony, to conduct discovery as well as to present witnesses during the evidentiary hearing on any and all issues relating to the Commission's implementation of S.C. Code Ann. § 58-41-20.

S.C. Code Ann. § 58-41-20(F)(1) provides that the Commission must review alternative PPA proposals "as proposed by intervening parties . . . in proceedings conducted pursuant to Section 58-41-20(A)." The record is uncontroverted and the Order properly finds that JDA and SCSBA did not present any specific "terms, conditions, and/or rate structures" designed to meet the requirements of S.C. Code Ann. § 58-41-20(F)(1) until the filing of proposed orders after the evidentiary record in this proceeding was closed. *See* Order No. 2019-881(A), at 164, (recognizing that JDA witness Chilton expressly declined to offer a proposal on behalf of JDA at the hearing). By submitting proposals in proposed orders after the conclusion of the evidentiary hearing, JDA and SCSBA effectively

circumvented the procedural requirements of Act 62. The Order properly found that such "late-filed proposals do not satisfy the procedural requirements of Act 62, the Commission's Rules of Practice and Procedure, or the South Carolina Administrative Procedures Act" as "Duke and other parties were afforded no opportunity for intervention, discovery, or responsive testimony to inform the Commission whether such proposals comply with fundamental requirements of Act 62." *See* Order No. 2019-881(A), at 19, 165.

The Commission should also reject JDA/SCSBA's argument that it somehow would have been an "impractical requirement" for intervenors to propose specific "terms, conditions, and/or rate structures" designed to meet the requirements of S.C. Code Ann. § 58-41-20(F)(1). These parties presented extensive evidence in the proceeding, including testimony addressing Duke's Standard Offer contract documents and Large QF PPAs. Each of these contract documents were timely entered into the record along with supporting testimony by Duke's witnesses. *See e.g.,* Hearing Ex. 6 and 7 (Direct and Rebuttal Standard Offer documents); Hearing Ex. 8 and 9 (Direct and Rebuttal Large QF PPA). Notably, SBA's own witness, Steven Levitas, also presented an alternative form of Large QF PPA to support his recommended modifications to the Company's proposed Large QF PPA. *See* Hearing Ex. 11. Thus, JDA/SCSBA's arguments that it would have been impractical to timely introduce a proposal that complies with S.C. Code Ann. § 58-41-20(F)(1) into the evidentiary record is both factually unsupported and legally unpersuasive. Moreover, to the extent JDA/SCSBA had concerns regarding their ability to timely submit a proposal that conformed to the requirements of S.C. Code Ann. § 58-41-20(F)(1), the Commission through Order No. 2019-107-H provided all parties the opportunity to timely

raise such issues through pre-hearing briefing weeks before the hearing. JDA/SCSBA failed to raise this issue until the close of the hearing. In sum, the Order properly finds that JDA/SCSBA's proposals were not entered into the evidentiary record and were not properly before the Commission to be decided under S.C. Code Ann. § 58-41-20(F)(1).

Notably, even assuming *arguendo* that the Commission should have considered JDA/SCSBA's proposals, the Commission's ultimate finding that "no proposal from intervenors has been entered into evidence in this proceeding that complies with [S.C. Code Ann. § 58-41-20(F)(1)]" was also informed by the Commission's determination that "Johnson Development's and SCSBA's proposal is deficient under the statute as it fails to properly be based upon 'a reduction in the contract price relative to the ten year avoided cost' as expressly required by S.C. Code Ann. § 58-41-20(F)(1)." *See* Order No. 2019-881(A), at 166. Thus, in addition to the Commission's determination that JDA/SCBA's proposals were new evidence in contravention of Order No. 2019-128-H and the procedural requirements of S.C. Code Ann. § 58-41-20(A)(2), the Commission also noted that JDA/SCSBA's proposals were not compliant with the express requirement of Act 62 to be priced at a decrement to the utility's 10-year avoided cost. Recognizing that JDA/SCSBA have not sought reconsideration of the Commission's determination that their proposals were not compliant with the "decrement to the 10-year avoided cost" requirement of S.C. Code Ann. § 58-41-20(F)(1), the Commission could also conclude its findings and conclusion on this issue were correctly decided as a matter of law on these grounds.

b. The Order's determination that JDA/SCSBA's longer-term PPA proposal was not supported by substantial evidence is supported by the record in these proceedings and JDA/SCSBA fail to establish that the Commission's conclusion is clearly erroneous.

JDA/SCSBA expend significant discussion in their Petition arguing that the Commission failed to properly find that "the record shows substantial evidence to support the proposal made by JDA/SCSBA in Proposed Orders" and suggest that the Commission's findings and conclusions to the contrary were "clearly erroneous." JDA/SCSBA Petition, at 34, 35. Petitioners highlight extensive testimony in the record regarding QF's financing needs, as well as testimony regarding the risks and purported mitigation of risks associated with long-term QF PPAs in an effort to support contract tenors longer than ten years. JDA/SCSBA Petition, at 36-42. While Duke submits that the Order reasonably and appropriately recognized this testimony in assessing the issue of longer-term contracts, *see* Order No. 2019-881(A), at 154-162, the more fundamental issue central to the Commission's determination was the complete lack of evidence supporting "additional terms, conditions, and/or rate structures ***as proposed by intervening parties***. . . ." as explicitly required by S.C. Code. Ann. § 58-41-20(F)(1). (emphasis added). The Order specifically found that "any determination by the Commission to approve contracts with a duration of longer than ten years must be predicated on specific proposals from intervenors that comply with S.C. Code Ann. § 58-41-20(F)(1) and are entered into the evidentiary record during the course of this proceeding." Order No. 2019-881(A), at 166. Because JDA/SCSBA failed to present such a proposal into the evidentiary record, the Commission declined to approve the proposals first introduced in JDA/SCSBA's proposed order. *Id.*

JDA/SCSBA's Petition now attempts to manufacture support for these dispatchable PPA proposals by invoking testimony from Duke witnesses,[10] the Power Advisory Report, as well as a single reference to SCSBA witness Davis' hearing testimony where JDA/SCSBA assert that witness Davis "supports dispatchable PPAs of 20 years in South Carolina just as are offered in North Carolina." JDA/SCSBA Petition, at 44. However, Duke's testimony and the Power Advisory Report are clearly not "proposed by intervening parties" as specifically required by Act 62. Moreover, reviewing Mr. Davis's cited testimony—the identical testimony cited in JDA/SCSBA's proposed order at page 73—shows that he was making a different point and not advocating for specific additional terms, conditions, and/or rate structures to be approved by the Commission to support PPA terms longer than 10 years. His actual testimony was: "Duke did not propose a dispatchable PPA in this proceeding. They're – they are allowed to do that. If they would prefer a dispatchable PPA to the PPAs that are currently being proposed, that is available to them to do. They have not proposed that." (Tr. Vol. 2, p. 795-796.) This statement provides no support for the proposal initially presented by JDA/SCSBA in their proposed order and for which these parties now seek reconsideration.[11] Thus, there is no evidence in the record by intervening parties to support the proposals first made by JDA/SCSBA in their proposed orders. Accordingly, JDA/SCSBA's request for reconsideration should be denied, as the

[10] While the Companies do not believe it necessary to address in detail here, JDA/SCSBA's Petition for Reconsideration mischaracterizes certain testimony of Duke witness Brown and ORS witness Horii before the Commission to create the false impression that the Proposal is supported by the record in a very similar fashion to JDA/SCSBA's proposed order. The Companies' *Response and Continuing Objection*, addressed *supra*, detailed these mischaracterizations at pages 11-12.

[11] As noted in Duke's Response and Continuing Objection *supra*, Mr. Davis is also incorrect in his assertion that Duke could have presented a dispatchable PPA proposal, as subsection (F)(1) requires alternative terms and conditions to be "proposed by intervening parties" while subsection (H) limits Duke's mandatory PPA option to comply with Act 62 to system emergency curtailments only. S.C. Code Ann. § 58-41-20(F)(1), (H).

Order properly determined that there was not substantial evidence in the record of "additional terms, conditions, and/or rate structures ***as proposed by intervening parties***. . . ." as required by S.C. Code. Ann. § 58-41-20(F)(1).

V. JDA/SCSBA's Alternative Request for Limited Rehearing to Introduce New Proposals under S.C. Code. Ann. § 58-41-20(F)(1) Should be Denied as a Matter of Law

JDA/SCSBA request that "if the Commission adopts the avoided energy rates proposed by SCSBA but continues to find insufficient evidence in the record to support that minimum lengths for PPAs be set in excess of ten years, [JDA/SCSBA] request this Commission hold a rehearing on this issue." JDA/SCSBA Petition, at 46. Just as the Commission should deny reconsideration, the Commission should also deny this conditional request for rehearing. First, as discussed in Section III above, the Order's determination regarding the Companies' avoided energy rates is based upon substantial evidence in the record, including the Power Advisory Report and ORS's testimony, and should not be reconsidered. Accordingly, because the Order's findings and conclusions on Duke's avoided cost rates are not clearly erroneous, as alleged by JDA/SCSBA, and because the Commission must not arbitrarily reverse itself, the condition precedent imposed by JDA/SCSBA on its request for rehearing has not been satisfied.

The second, equally important, reason that the Commission should not grant rehearing is that rehearing is improper as a matter of law under S.C. Code Ann. § 58-27-2150 as well as under Act 62. Rehearing is not authorized under S.C. Code Ann. § 58-27-2150 because rehearing may be granted only "in respect to any matter determined in such proceedings and specified in the application for rehearing…" This provision limits the matters that may be reheard to issues that are "determined in such proceedings." As discussed above, the Commission's Order held that "no proposal from intervenors has been

entered into evidence in this proceeding that complies with [S.C. Code Ann. § 58-41-20(F)(1)] . . ." *See* Order No. 2019-881(A), at 166. Accordingly, because JDA/SCSBA failed to enter a proposal into evidence during the proceeding, there were no issues of fact related to proposals offered by intervenors pursuant to S.C. Code Ann. §58-41-20(F)(1) that were actually "determined" by the Commission and that can now properly be reheard. Put another way, the only determination made by the Commission in Order No. 2019-881(A) regarding the JDA/SCSBA proposal was that it had not been properly submitted into evidence as required under Act 62, as a matter of law. Therefore, the Commission cannot now "rehear" evidence on new proposals that were not actually determined in the Order.

Granting rehearing to hold another proceeding on new proposals to be formulated and proposed by intervenors under S.C. Code Ann. §58-41-20(F)(1) would also be fundamentally inconsistent with the procedural framework established by the General Assembly in enacting Act 62. The General Assembly could not have been more explicit in prescribing the procedure that the Commission follow in considering proposals offered by intervenors under S.C. Code Ann. §58-41-20(F)(1): "Notwithstanding any other language to the contrary, the commission will make such a determination in proceedings conducted pursuant to subsection (A) [of Section 58-41-20]." *See* S.C. Code Ann. §58-41-20(F)(1). The General Assembly also established explicit procedural requirements to ensure all parties' due process rights were preserved, *see* S.C. Code Ann. §58-41-20(A)(2) ("Proceedings shall include an opportunity for intervention, discovery, filed comments or testimony, and an evidentiary hearing"), and was equally explicit in directing the

Commission to complete this initial PURPA proceeding and to address all issues before the Commission within six months of Act 62's enactment.

> Within six months after the effective date of this chapter, and at least once every twenty four months thereafter, the commission shall approve each electrical utility's standard offer, avoided cost methodologies, form contract power purchase agreements, commitment to sell forms, and any ***other terms or conditions necessary to implement this section***.

See S.C. Code Ann. §58-41-20(A). Taken together, these provisions plainly contemplate that any optional proposals to be made by intervening parties under S.C. Code Ann. §58-41-20(F)(1) should have been made and determined by the Commission as part of the proceedings held by the Commission under S.C. Code Ann. §58-41-20(A). That proceeding has now concluded and all issues before the Commission have now been decided. The Order appropriately recognizes that JDA/SCSBA "may also timely bring forward proposals that meet the subsection (F)(1) requirements in future avoided costs/PURPA implementation proceedings initiated by the Commission under S.C. Code Ann. § 58-41-20(A)." Order No. 2019-881(A), at 167.

Finally, granting rehearing for the purpose of initiating a new evidentiary proceeding prior to the Commission's next PURPA proceeding under S.C. Code Ann. § 58-41-20(A) would most assuredly be arbitrary and capricious, as the Commission fully and clearly explained its rationale for not considering JDA/SCSBA's proposals, as well as provided guidance for how QFs could still pursue entering into longer term contracts in compliance with Act 62 prior to the next avoided cost/PURPA implementation proceeding to be held pursuant to S.C. Code Ann. § 58-41-20(A). In addition to "elect[ing] to compete in the now-open CPRE Program Tranche 2 for a 20-year fixed price PPA" and recognition of the Commission's recent opening of Docket No. 2019-364-E for the purpose of

establishing a South Carolina Competitive Procurement Program, the Order "also note[d] that S.C. Code Ann. § 58-41-20(A) provides electrical utilities and small power producers the right to mutually agree to enter into PPAs with terms that differ from the commission approved form(s); however, those terms will not be dictated as just and reasonable and mandatory for all QFs in these proceedings." Order No. 2019-881(A), at 166-167. A Commission decision to completely reverse course from the Order's conclusions on this issue and to allow rehearing would be arbitrary and capricious as it would be made without a rational basis or adequate determining principles. *See Daufuskie Island Utility Company, Inc. v South Carolina Office of Regulatory Staff*, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019).

For all of the foregoing reasons, JDA/SCSBA's request for limited rehearing to offer new proposals under S.C. Code. Ann. § 58-41-20(F)(1) should be denied as a matter of law.

VI. JDA/SCSBA's Request for "Clarification" Regarding the Study Contemplated by S.C. Code Ann. § 58-37-60 is Outside the Scope of This Proceeding.

The JDA/SCSBA Petition requests the Commission clarify its intent to initiate a study pursuant to S.C. Code Ann. § 58-37-60 for DEC and DEP. JDA/SCSBA Petition, at 47. JDA/SCSBA go on to request that the Commission adopt a conclusion from the Dominion Energy South Carolina's ("DESC") avoided cost order, Order No. 2019-847, that the Commission will initiate an additional proceeding under Act 62 to review again DESC's avoided costs, based on the outcome of that study. *Id.* JDA/SCSBA's request is outside the scope of this proceeding and should be more appropriately addressed in a separate docket dedicated to the study contemplated under S.C. Code Ann. § 58-37-60.

As fairly described by JDA/SCSBA, the settlement agreement approved by the Commission on the solar Integration Services Charge ("SISC Settlement") describes the settling parties' agreement as to any coordination between future review of the solar Integration Services Charge and the study contemplated under S.C. Code Ann. § 58-37-60. The SISC Settlement represents the entirety of the settling parties' agreement on the interrelationship between these two studies. It would be improper for the Commission, through clarification, to potentially alter the agreement of the settling parties on this issue.

Additionally, it would be improper for the Commission to apply its conclusion from the DESC Order to this proceeding, where no similar issues were raised, much less addressed, as to the relevance or applicability of the study under Act 62 to any future proceedings under S.C. Code Ann. § 58-41-20. The requested clarification on this topic is not as straight-forward as JDA/SCSBA present, and Duke believes disagreement exists among the parties to the instant proceeding as to whether or how the results of such study could be applicable to future avoided cost cases, the exception of the agreed-upon language in the SISC Settlement.[12] Again, this topic was not raised in the course of this proceeding, and making a determination based on the limited information offered through a post-hearing Petition for reconsideration would be improper.

Should the Commission desire to authorize the study contemplated by Act 62, it is free to do so and seek input from interested parties as contemplated under S.C. Code Ann. § 58-37-60. The Companies submit that such authorization would be more appropriate in a docket dedicated to this specific issue that allows participation and input from all interested stakeholders.

[12] The study, as described by the General Assembly in S.C. Code Ann. § 58-37-60, is not specifically designed to inform the utility's cost of avoided energy or avoided capacity in a future avoided cost proceeding.

CONCLUSION

Wherefore, for the reasons stated herein, DEC and DEP respectfully request that the Commission deny reconsideration of the Commission's Order requested by SACE/CCL and JDA/SCSBA, except as to the issue of updating the avoided capacity inputs in applying the peaker methodology to calculate avoided costs for Large QFs, as addressed in Section III.c. of this Response, and deny rehearing requested by JDA/SCSBA.

Respectfully submitted, this the 22nd day of January, 2020

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